


B1040 (FORM 1040) (12/15)

<b>ADVERSARY PROCEEDING COVER SHEET</b> (Instructions on Reverse)		<b>ADVERSARY PROCEEDING NUMBER</b> (Court Use Only)		
<b>PLAINTIFFS</b>  Simmons Bank	<b>DEFENDANTS</b>  Sherry R. Sims			
<b>ATTORNEYS</b> (Firm Name, Address, and Telephone No.) Albertelli Law c/o Jeffrey S. Fraser 5404 Cypress Center Drive, Suite 300 Tampa, FL 33609 (813)-221-4743	<b>ATTORNEYS</b> (If Known) Joyce W. Lindauer 1412 Main Street, Suite 500 Dallas, TX 75202 (972) 503-4033			
<b>PARTY</b> (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input checked="" type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	<b>PARTY</b> (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee			
<b>CAUSE OF ACTION</b> (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)				
<b>NATURE OF SUIT</b> (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)				
<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top; border: none;"> <b>FRBP 7001(1) – Recovery of Money/Property</b>  <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property  <input type="checkbox"/> 12-Recovery of money/property - §547 preference  <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer  <input type="checkbox"/> 14-Recovery of money/property - other   <b>FRBP 7001(2) – Validity, Priority or Extent of Lien</b>  <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property   <b>FRBP 7001(3) – Approval of Sale of Property</b>  <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h)   <b>FRBP 7001(4) – Objection/Revocation of Discharge</b>  <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e)   <b>FRBP 7001(5) – Revocation of Confirmation</b>  <input type="checkbox"/> 51-Revocation of confirmation   <b>FRBP 7001(6) – Dischargeability</b>  <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims  <input checked="" type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud  <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny   <div style="text-align: center;">(continued next column)</div> </td> <td style="width: 50%; 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<input type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23			
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$			
Other Relief Sought				

**B1040 (FORM 1040) (12/15)**

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Sherry R. Sims		BANKRUPTCY CASE NO. 21-30467-mvl7
DISTRICT IN WHICH CASE IS PENDING Northern	DIVISION OFFICE Dallas	NAME OF JUDGE Michelle V. Larson
RELATED ADVERSARY PROCEEDING (IF ANY) n/a		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) 		
DATE 4/23/2021		PRINT NAME OF ATTORNEY (OR PLAINTIFF) Jeffrey S. Fraser,

### INSTRUCTIONS

The filing of a bankruptcy case creates an “estate” under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor’s discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 1040, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court’s Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 1040 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff’s attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

**Plaintiffs and Defendants.** Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

**Attorneys.** Give the names and addresses of the attorneys, if known.

**Party.** Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

**Demand.** Enter the dollar amount being demanded in the complaint.

**Signature.** This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION  
[www.txnb.uscourts.gov](http://www.txnb.uscourts.gov)

IN RE:  
SIMMONS BANK,  
Plaintiff,

VS.

SHERRY R. SIMS  
Defendant,

ADV. CASE NO.

*Main Bk Case No. 21-30467-mvl7*

Debtor.  
\_\_\_\_\_ /

**COMPLAINT TO DETERMINE DEBT OWED BY SHERRY R. SIMS TO SIMMONS  
BANK AS NON-DISCHARGEABLE PURSUANT TO §523(a)(2)(A)**

COMES NOW, the Plaintiff, **SIMMONS BANK** (hereinafter “Simmons”), by and through the undersigned counsel and hereby sues the Defendant, (hereinafter the “Debtor” or “Sims”), in connection to an alleged unsecured debt that should be deemed non-dischargeable, pursuant §523(a)(2)(A) of the Bankruptcy Code. In support, Simmons respectfully alleges the following:

**Background and Jurisdiction**

1. This is an adversarial proceeding filed pursuant to Federal Bankruptcy rules of Procedure Rule 7001.
2. Jurisdiction is vested in this Court by virtue of 28 U.S.C. Section 1334 and 28 U.S.C. Section 157(b)(2)(I).
3. That Sims filed for protection under Chapter 7 of the Bankruptcy Code on March 17, 2021.
4. That prior to the Debtor’s bankruptcy petition, the Debtor opened a credit card account with Simmons on June 12, 2019. As of the date of this bankruptcy’s petition, the total

amount owed to Simmons by the Debtor is **\$18,659.73**. The Debtor lists the Simmons debt on Schedule E/F in the amount of \$18,492.02 as a non-priority unsecured claim.

5. That shortly before the petition date (again on March 17, 2021), the Debtor – using the Simmons credit card – made in excess of thirty (30) charges to AMAZON.COM in the months of January and February of 2021, and a **\$1,189.67** charge to APPLE.COM on February 1, 2021. Attached as Exhibit A to this Complaint is a billing statement for Sims evidencing the stated charges along with a collection of other charges made on the account in the two months immediately preceding the bankruptcy petition.

6. That also included in the billing statement is a charge of **\$2,500.00** paid to the counsel of the Debtor (the “bankruptcy fee”) – presumably in connection to the legal services for the Debtor’s instant bankruptcy filing. Furthermore, two other charges on February 3, 2021 (**\$3,740.00**) and February 5, 2021 (**\$3,760.00**) also appear to be legal fees.

**Count I: Non-dischargeable debt pursuant to §523(a)(2)(A)**

7. Simmons reaffirms the above allegations contained in Paragraphs 1-6 as if fully incorporated herein.

8. Section 523(a)(2)(A) excepts from discharge “any debt—for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by false pretenses, a false representation, or actual fraud....” 11 U.S.C.A. §523(a)(2). In re Thanh V. Truong, 271 B.R. 738, 744 (Bankr. D. Conn. 2002).

9. The Debtor’s conduct immediately prior to the bankruptcy petition falls squarely into the “false representation” component of §523(a)(2)(A), and as such, the Simmons’ debt should be excepted from the discharge in this case.

10. **Each use of a credit card is a representation of an intent to pay.** *Id.* at 745. Emphasis added. *See also Bank of America v. Jarczyk (In re Jarczyk)*, 268 B.R. 17, 21 (W.D.N.Y.2001) (“By far, the majority of courts have adopted what is sometimes termed the ‘**implied representation**’ theory, which holds that **each time a cardholder uses his credit card, he impliedly represents to the issuing bank that he intends to repay the debt incurred.**”). That is so because a representation may be made either through spoken words or, in the context of a credit card, implied through conduct. Emphasis added. In re Mercer, 246 F.3d at 406 (2001).

11. Courts often use a totality of circumstances approach to discern a debtor's subjective intent by applying a non-exhaustive list of factors ("badges of fraud") including, but not limited to: (1) the time elapsed between the charges, (2) whether the debtor consulted an attorney with respect to the filing of bankruptcy prior to incurring the subject charges, (3) number and amount of charges, (4) financial condition of debtor when charges were incurred, (5) if the charges exceeded the credit limit, (6) if multiple charges were incurred on the same day, (7) if the debtor was employed (and if not, the debtor's prospect for employment), (8) the debtor's financial sophistication, (9) if there were any sudden factors...and (10) if the charges were made for the purchase of luxury items or necessities. Truong at 746.

12. Here, Sims' conduct coincides with several of the above badges of fraud. As stated, the Debtor continuously used the Simmons credit card in the months immediately preceding the bankruptcy. Per the most recent statements on the account (Exhibit A), between January 9, 2021 and February 10, 2021, the Debtor made thirty (34) separate purchases from AMAZON.COM, two (2) substantial purchases from APPLE.COM, and a \$205.66 charge from Best Buy. Except for a few food and supermarket charges, the rest of the charges appear to be non-essential luxury items.

13. Furthermore, the Debtor clearly consulted with an attorney in connection with her financial situation, as evidenced by *actual* payment (with the Simmons credit card) for the attorney's bankruptcy services.

14. As it relates to the Debtor's financial situation and an ability (and intent) to repay the debt, according to the Debtor's Schedule I, the Debtor is not employed (and as such made all of these charges as an individual with no ongoing income).

15. Furthermore, as of the date of the petition, the Debtor indicates only \$123.00 in cash on hand. This clearly displays that the Debtor had no intention (or funds) to pay back Simmons, while the Simmons credit card financed several non-essential purchases immediately before the bankruptcy.

16. Pursuant to §523(a)(2)(A), a finding that a debt is non-dischargeable is based on whether the debtor, at the time the debt is incurred, subjectively intended to repay the debt. For example, when a debtor uses a credit card with no intention of honoring the obligation, it may be less reprehensible when such transactions are made for necessities, such as for food, as opposed for luxury items, such as jewelry. Yet, **it is still fraud nonetheless**. Robin Hood may have stolen

from the rich, but it was still stealing. Emphasis added. Chase Bank v. Brumbaugh, 383 B.R. 907, 910 (Bankr. N.D. Ohio, 2007). In *this* case, most of the Debtor's purchases are not even necessities.

17. Cumulatively, the Debtor did not have a job, made numerous credit card charges for non-necessary items, and then filed bankruptcy shortly thereafter. To boot, Sims used the same credit card to pay for her bankruptcy attorney.

18. Based on the forgoing, the Debtor clearly had no intention on repaying the Simmons debt; and the Debtor's conduct falls within the parameters of §523(a)(2)(A) and this Court should deem the debt owed to Simmons bank non-dischargeable in its entirety.

WHEREFORE, **SIMMONS BANK** respectfully requests that this court enter an order determining that the debt owed to **SIMMONS BANK** in the amount of **\$18,659.73** be deemed non-dischargeable pursuant to §523(a)(2)(A); and for the court to grant any and all other relief the court deems just and appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of April 2021, I served a copy of the foregoing upon:

**SERVICE LIST**

Sherry R. Sims  
107 Waters Garden  
PO BOX 1830  
Waxahachie, TX 75165

Joyce W. Lindauer  
Joyce W. Lindauer Attorney, PLLC  
1412 Main Street, Suite 500  
Dallas, TX 75202

*Trustee*  
Anne Elizabeth Burns  
900 Jackson Street, Suite 570  
Dallas, TX 75202

*United States Trustee*  
1100 Commerce Street, Room 976  
Dallas, TX 75202

/s/ Jeffrey S. Fraser, Esq.

JEFFREY S. FRASER, ESQ.

Florida Bar No. 0085894

*Admitted to all Federal District Courts in and for  
the State of Texas (S.D., N.D., W.D., E.D.)*

**ALBERTELLI LAW**

Attorney for Secured Creditor

PO Box 23028

Tampa, FL 33623

813-221-4743 ext. 2499

Facsimile: (813) 221-9171

[bkfl@albertellilaw.com](mailto:bkfl@albertellilaw.com)

Alternate Email: [jfraser@alaw.net](mailto:jfraser@alaw.net)